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# Damages for Pecuniary Loss in Cases of Wrongful Birth

*Martin Hogg\**

**Abstract:** In this article, a comparative examination is made of the award of damages for pecuniary losses in cases of wrongful birth, such category including claims in respect of both healthy as well as disabled children. It is argued that such claims do not necessarily infringe the sanctity of human life, so long as it is the economic harm occasioned to parents by the birth of the child which is conceived of as the relevant harm rather than the birth of the child. Further jurisdictional harmonisation in this field, which is already more evident in respect of disabled children than healthy children, will depend upon a common understanding of the nature of the harm in question, as well as a willingness to find solutions to questions of the attribution of responsibility for harm discussed in the article.

## I. Introduction

This paper concerns damages for pecuniary losses in so-called ‘wrongful birth’ claims.<sup>1</sup> Broadly defined, this type of claim can be broken down in to two main sub-types:

(1) claims by parents for damage said to be constituted either by the unwanted conception and subsequent birth of a healthy child, or by the pecuniary costs of bringing up such an unwanted healthy child. In such cases, the parents typically attempt to claim for the pecuniary losses constituted by the whole costs of bringing up the child until it reaches adulthood, and/or loss of income sustained during pregnancy and childrearing. The parents’ argument is that, as no child was wanted, therefore all costs associated with its birth and childrearing should be recoverable. This type of case, involving the birth of a healthy child, is sometimes referred to as a ‘wrongful conception’ claim.

(2) claims by parents in respect of the damage said to be constituted either by the birth of a disabled child, the birth (or even conception) of which would have been avoided by the parents had they known of the risk of a disability prior to conception or while the child was still *in utero*, or the extra costs of childrearing attributable to the disability of the child on the basis that, while a child was wanted, a child with the disability in question was not. Occasionally, the facts may indicate that, in the absence of the defendant’s fault (for instance in failing to warn of a risk of disability

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<sup>1</sup> The very title ‘wrongful birth’ claim is somewhat misleading, given that it is now common (as will be seen) to seek to avoid calling the birth itself the harm. However, we appear to be stuck with the terminology.

in any child which might be born), the birth of any child would have been avoided, and in such cases a claim for the full costs of childrearing will be likely. This type of case, involving the birth of a disabled child, is referred to as ‘wrongful birth’ narrowly so called (rather than wrongful birth more widely defined to include type (1) cases also).

The type of fault at issue may be an act, such as defective testing of the foetus while in the womb, or an omission, such as a failure to warn about the likelihood of genetic defects if conception occurs or a failure to sterilise a patient. Note that in wrongful birth claims narrowly so-called, involving the birth of a disabled child, the disability itself will not be caused by the defendant: rather the fault lies in not detecting the disability, or in a failure to warn of the risks of the disability arising. The defendant in both types of claim is usually a medical practitioner, such as a doctor or nurse, or a body vicariously liable for such a practitioner, such as a hospital, medical authority, medical trust, or some similar body, though manufacturers of, for instance, fertility or contraception products may also be called as defendants.

Although cases involving healthy and disabled children will be distinguished, some argue that nothing turns on such a distinction and that it is not one of principle. It is sometimes alternatively suggested that the important distinction is who is suing (the parents or the child). This distinction certainly matters too, but that does not negate the worth of distinguishing between parental claims in respect of a healthy child and a disabled child. That distinction matters because, as will be seen, it has been held by the courts to impact on what economic costs may be claimed.

While both type (1) and (2) claims will be considered, there is no consideration in what follows of claims by the *child* that it ought not to have been born in the first place (so-called ‘wrongful life’ claims), as these form a substantial field of jurisprudence in their own right and are therefore the subject of a separate article in this issue.<sup>2</sup> On the other hand, though the policies which affect whether a wrongful birth claim is allowable at all are also the subject of another article in this issue,<sup>3</sup> there will inevitably be references to some of these policies in the present discussion, given that such policies impact upon the question of pecuniary damages.

## **II. Jurisdictional approaches to pecuniary claims**

### *A. Claims in respect of healthy children*

#### *1) Jurisdictional survey*

The focus in the present discussion is on those jurisdictions which do allow

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<sup>2</sup> See *A Ruda*, ‘I Didn’t Ask to be Born’: Wrongful Life From a Comparative Perspective.

<sup>3</sup> See *BC Steininger*, Wrongful Birth and Wrongful Life – Basic Questions.

pecuniary damages claims, an examination being undertaken of the varying assessments of such damages.

However, one cannot ignore the fact that there are a not insubstantial number of jurisdictions which do not generally permit pecuniary claims including Austria,<sup>4</sup> Denmark,<sup>5</sup> England and Wales,<sup>6</sup> France,<sup>7</sup> Hungary,<sup>8</sup> Ireland,<sup>9</sup> Norway,<sup>10</sup> and Scotland.<sup>11</sup> In England, Wales, and Scotland, however, limited recovery in the form of loss of income by the mother during pregnancy may be claimed. This is as a result of the decision of the House of Lords in the Scottish appeal *McFarlane v Tayside Health Board*.<sup>12</sup>

In *McFarlane*, perhaps the best known case in this field, the pursuers were a married couple with four children. They wished no further children, so the husband underwent a vasectomy. The operation was carried out by a surgeon employed by the defender. Following the operation, the surgeon confirmed that it had been a success. However, the wife became pregnant again and subsequently gave birth to a healthy child. The pursuers sued the defender in delict for damages, the claim including a sum for the wife's discomfort and pain during pregnancy (a non-pecuniary claim with which the present discussion is not primarily concerned) as well as a further sum for the costs associated with the pregnancy and the upbringing of the child. At first instance, all the claims were rejected; on appeal, that decision was overturned. On a further appeal to the House of Lords, the parents' claim for pecuniary damages was allowed only in part, though the mother's claim for pain and suffering was upheld. Their Lordships held that the surgeon, having broken a duty of care in regard to the prevention of a pregnancy, was liable for losses caused by that pregnancy, those being the medical costs of the pregnancy and birth, but not any further pecuniary losses<sup>13</sup>. It is, however, almost impossible to get at a single, underlying reason for the decision on the pecuniary damages, as each of the five judgments discloses different justifications for the result reached. If one can identify a rationale for the majority view, however, it would seem to be that the pecuniary losses related to the pregnancy and birth were not to be considered as pure

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<sup>4</sup> *Oberster Gerichtshof* (Austrian Supreme Court, OGH) 14 September 2009, 6 Ob 101/06f; OGH 7 August 2008, 6 Ob 148/08w.

<sup>5</sup> The Danish courts allow limited recovery for costs associated with a re-sterilisation after the failed one: see the decision U (Ugeskrift for Retsvæsen, Weekly Law Report) 1961.239/2.

<sup>6</sup> *Rees v Darlington Memorial NHS Trust* [2003] United Kingdom House of Lords (UKHL) 52, [2004] 1 Appeal Cases (AC) 309 (applying the prior decision in the Scottish appeal *McFarlane v Tayside Health Board*, citation at fn 11).

<sup>7</sup> Cass 1st civ 25 June 1991.

<sup>8</sup> Supreme Court, Legf Bír Pf III 26.339/2001 sz – EBH 2003 941 sz/ BH 2004 143 sz.

<sup>9</sup> *Byrne v Ryan* [2007] High Court of Ireland (IEHC) 207.

<sup>10</sup> Where even though the alleged harm is not seen as the birth itself, but the costs of raising the child, recovery is still not permitted: *Høyesterett* (Supreme Court) 15 February 1999, Retstidende (Rt) 1999, 203.

<sup>11</sup> *McFarlane v Tayside Health Board* 2000 Session Cases, House of Lords (SC (HL)) 1, [2002] AC 59, 2000 Scots Law Times (SLT) 154.

<sup>12</sup> Citation at fn 11.

<sup>13</sup> In his speech in *McFarlane*, Lord Slynn stated (at page 9 of the Session Cases report) that, though these had not been claimed by the mother, in his opinion loss of earnings due to pregnancy and birth would in principle have been recoverable.

economic loss, occurring as they did alongside the demonstrable physical harm constituted by the pain and suffering of pregnancy and childbirth.<sup>14</sup> They were thus *derivative* or *consequential* economic losses, these being much easier to claim for in Scots, as well as English, law. The House of Lords held that it would be unfair and unreasonable to impose liability for the pure economic costs of bringing up the child, such costs being seen by the majority of the judges as a different harm, and not simply secondary losses flowing from a single harm. This categorisation of the costs of bringing up the child as pure economic loss flowing from a separate harm made it almost inevitable that no responsibility for such loss would attach to the doctor, given the difficulty of recovering pure economic loss in delict in Scotland or in tort in England and Wales. This pure economic loss categorisation of the childrearing costs is somewhat unconvincing (and indeed it has not been adopted in some of the type (2) cases, as will be seen below): it seems somewhat artificial to categorise the losses caused by childrearing as arising from a separate harm, when the unwanted pregnancy and birth is the *sine qua non* of such losses.<sup>15</sup> Given such a causal connection, it surely seems more sensible to see them as derivative or consequential economic losses. Indeed, the approach of the majority was not that of one judge: Lord Millett, by contrast, refused to divorce the economic consequences from the birth itself; the latter he called ‘a blessing, not a detriment’,<sup>16</sup> and therefore not amenable to a damages claim for the costs of childrearing. Such a fundamental divergence of approach makes it very difficult to state clearly what the reasoning of the court was in *McFarlane*. This is an inevitable feature of the British tradition of multiple judgments. One can at least say that the result mandated by *McFarlane* is not in doubt: most of the economic costs of an unwanted healthy birth will not be claimable from the negligent doctor or his employer.

While other jurisdictions similarly restrict recovery for the economic costs of childrearing, they do not do so using the peculiarly Common and Scots law analysis of duty of care, with its language of proximity and fairness and reasonableness. Moreover, in jurisdictions in which wrongful birth claims are treated largely within contract law, the complexities of the pure economic loss debate common in British jurisprudence is absent.

Given the countries listed above which do not permit pecuniary loss claims where a healthy child is born, it would seem that the jurisdictional attitude to abortion is not, on the face of it, a decisive factor in the decision to disallow such claims, given that, for instance, both Ireland (which operates an almost total ban on abortions) and

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<sup>14</sup> To call such physical effects of pregnancy and childbirth a type of harm may be somewhat controversial, given that pregnancy and childbirth are quite normal physical processes. However, the judges in *McFarlane* felt the pain which such processes can produce could nonetheless be categorised as harm.

<sup>15</sup> Admittedly, in some cases certain losses may be hard to categorise as derivative economic loss. For instance, where a wife has been incompetently sterilised, it is hard to see any loss of income of the husband incurred as a result of childrearing duties as derivative economic loss flowing from the harm done to the wife. This concern can be overcome, however, if the parents are claiming as a couple and are treated as an economic unit, when losses to that economic unit can properly be viewed as flowing from the defendant’s harmful conduct.

<sup>16</sup> Per Lord Millett [2000] 2 AC at 114.

England (which operates a liberal abortion regime) feature in this list of jurisdictions disallowing claims. It seems to be the case that judges feel able to maintain the view that a healthy birth is by definition a benefit, and not a harm, regardless of the legislative position on abortion in their jurisdiction.

In some jurisdictions, the position regarding a claim for pecuniary losses following the birth of a healthy child is unclear, these jurisdictions including Malta,<sup>17</sup> Estonia,<sup>18</sup> and Romania<sup>19</sup>.

Jurisdictions which do allow claims for pecuniary losses related to the upbringing of a healthy child include Belgium,<sup>20</sup> the Czech Republic,<sup>21</sup> Germany,<sup>22</sup> Italy,<sup>23</sup> the Netherlands,<sup>24</sup> Poland,<sup>25</sup> Spain,<sup>26</sup> and Switzerland.<sup>27</sup> Again, this list contains jurisdictions with quite divergent attitudes to the question of abortion. Typically the claim for pecuniary losses is only admissible in these jurisdictions on the understanding that what is being compensated is not the birth of the healthy child itself, but some other harm.<sup>28</sup>

## *2) The type of harm claimed: problems of causal responsibility*

To avoid calling the birth of a healthy child itself a type of damage, and to enable judges to make an award for pecuniary losses related to such a birth, many national courts say that, so far as pecuniary loss is concerned, it is the economic loss caused to the parents by such a birth which is the damage being compensated. This, however, creates a potential problem for the attribution of responsibility for such loss (or a problem of 'legal causation' as some jurisdictions might call it). Whilst there is no difficulty in seeing an act of medical negligence, such as a failure to

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<sup>17</sup> In *A v B*, Writ no 1000/2002, Court of Appeal, 30 May 2008, a claim in respect of the birth of an unwanted healthy child was denied on the ground that there was no fault on the part of the defendant surgeon. However, the decision gives no clue as to whether, and if so under what conditions, such a claim might be permitted.

<sup>18</sup> In Estonia, compensation in delict is permissible only for one of a *numerus clausus* of delicts, though arguably wrongful conception might constitute damage to health under the Law of Obligations Act (LOA) § 1045(1)(ii).

<sup>19</sup> The courts have yet to consider the question.

<sup>20</sup> *Neue juristische Wochenschrift* (NJW) 2004, 558; 11 *Revue de droit de la santé/Tijdschrift voor gezondheidsrecht* (Rev Dr Santé/T Gez) 2004-2005, 389.

<sup>21</sup> Decision of the Regional Court in Brno, 29 February 2008.

<sup>22</sup> *Bundesgerichtshof* (German Supreme Court, BGH) 8 July 2008, NJW 2008, 2846; BGH 18 March 1980, VI ZR 105/78, BGHZ 76, 249.

<sup>23</sup> *Corte di Cassazione*, 8 July 1994, no 6464 (Nuova Giurisprudenza Civile Commentata (NGCC) 1995, I, 1107).

<sup>24</sup> *Hoge Raad* (HR) 21 February 1997, *Nederlandse Jurisprudentie* (NJ) 1999, 145.

<sup>25</sup> *Sąd Najwyższy* (Polish Supreme Court, SN) 22 February 2006, III CZP 8/06, *Orzecznictwo Sądu Najwyższego* (OSN) 7-8/2006, item 123; SN 13 October 2005, IV CK 161/05, *Orzecznictwo Sądów Polskich* (OSP) 6/2006, item 71.

<sup>26</sup> *Tribunal Supremo* (Supreme Court, TS) 27 July 2006, RJ 2006/6548; TS 27 April 2001, RJ 2001/6891; TS 24 September 1999, RJ 1999/7272; TS 5 June 1998, RJ 1998/4275.

<sup>27</sup> *Entscheidungen des Schweizerischen Bundesgerichtes* (BGE) 20 December 2005, 4C. 178/2005.

<sup>28</sup> There are statements to that effect in reported judgments from jurisdictions including Germany, the Netherlands, Poland, and Switzerland.

perform a sterilisation procedure properly, as a cause to which responsibility can be attributed if it is the birth of the child which is the alleged harm, if, on the other hand, it is the economic cost of raising that child which is said to be the relevant harm, then it is arguably the legal duty resting upon parents to support their children which is the cause to which responsibility is most naturally attributed for such harm. The medical negligence may be a *sine qua non* of such costs, but its causal significance can arguably be said to have been eclipsed by the subsequently arising parental duty of support. True, such duty of parental support only came into existence because of the defendant's negligence, but in most legal systems that duty of parental support is perceived to be a fundamental societal value, such that the reason that it came into being only as a result of a third party's negligence is not seen as sufficient to impose the duty of financial support upon that third party rather than upon those to whom it would normally fall as an intimate component of the whole parent-child relationship.

Not all jurisdictions have properly considered this problem; some appear to have ignored it, or not to have noticed it. The Polish courts, however, grasping the problem, have held that the policy reasons supporting a damages claim overcome any causal concerns.<sup>29</sup> The Spanish Supreme Court took a different approach in one decision. It recognised that, under Art 154 of the Spanish Civil Code, maintenance costs of childrearing are to be viewed as attributable to the parental duty of support. However, it permitted pecuniary damages for claimed loss of income which would be sustained during the period of childrearing on the basis that such damages were 'an aid for the maintenance and upbringing of the children'.<sup>30</sup> This distinction may seem something of a legal nicety, but it allows partial achievement of the same result as that in Poland. The Czech courts have avoided the problem altogether by holding that, in the case of an unwanted birth of a healthy child, the relevant damage is the infringement of the claimant's personality rights under the Civil Code, and have awarded pecuniary damages for such infringement in an amount including the costs of medical treatment and loss of income.<sup>31</sup> Other jurisdictions have, however, explicitly rejected the view that the birth of a healthy child can constitute an infringement of a personality right, and have therefore held that no harm occurs in such a case.<sup>32</sup> There would appear to be, as yet, no uniform way of tackling the 'child as harm' problem and the problems of attribution of responsibility which alternative formulations of damage create.

A further conceivable problem of causal attribution is that a mother who chooses not to abort an unwanted healthy child might herself be argued to be the cause of the pecuniary losses she goes on to suffer. Such an argument has, however, not found favour where it has been raised. For instance, the point was argued in Switzerland, where abortion is available on demand, that it is relevant to a claim for pecuniary losses flowing from an unwanted healthy birth that parents might have

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<sup>29</sup> See the discussion in the Polish Supreme Court judgment of 22 February 2006, III CZP 8/06, OSN 7-8/2006, item 123.

<sup>30</sup> RJ 1998\4275.

<sup>31</sup> Decision of the Regional Court in Brno, 29 February 2008.

<sup>32</sup> This is, for instance, the view of the Hungarian courts: Supreme Court, Legf Bír Pf III 26.339/2001 sz – EBH 2003 941 sz/ BH 2004 143 sz.

avoided the loss by aborting the foetus; however, the courts rejected such an argument, and considered that parents have no duty to abort the foetus.<sup>33</sup> This judicial opinion does not, of course, need stating in those jurisdictions where abortion of a healthy foetus is prohibited, where evidently the choice to abort could not have been lawfully made in any event.

### *3) Damages claimable*

Where a claim is permitted, jurisdictions typically (though not invariably) award a wide range of pecuniary costs, including the reasonable costs of maintenance of the child, the medical costs of pregnancy and childbirth, and any loss of income of the carer of the child. By way of example, in Belgium recovery has been permitted, following a failed sterilisation, in respect of the material damage constituted by medical expenses, food for and educational expenses of the child, and loss of parental salary due to the necessity of working only part-time.<sup>34</sup> The Polish courts have expressed a preference for awarding damages in the form of monthly payments, assessed according to the criteria used in alimony cases.<sup>35</sup> The Spanish courts, by contrast, have taken a somewhat more restrictive approach: because childrearing costs themselves are not claimable (being seen, as noted above, as incurred as a result of the parental duty of support), a one-off damages award for a failed sterilisation may be made, such award incorporating any loss of income during pregnancy and for any post-natal period of time during which the mother has to give up work, but a claim for a further monthly allowance to cover the maintenance of the child born is not permitted.<sup>36</sup> The variety of costs claimable, and form of the award, reflect the somewhat differing conceptions of the precise nature of the damage compensable in different jurisdictions and differing views of how to deal with the problem of the cause to which responsibility for the losses should be attributed.

### *4) Restrictions on damages claims*

A number of matters might conceivably restrict a claim for damages for pecuniary losses following wrongful birth, apart from the categorisation of the loss as pure or consequential loss or problems of attribution of responsibility for the costs.

The German Supreme Court (Bundesgerichtshof, *BGH*) has stated that, in cases where the claim arises out of a failed sterilisation, a damages claim will only be permitted if it can be demonstrated that the claimant did not want any more children.<sup>37</sup> It might seem obvious, given the objective medical goal of a

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<sup>33</sup> BGE 20 December 2005, 4C. 178/2005.

<sup>34</sup> Hof van Beroep of Antwerp, 8 September 2003, NjW 2004, 558; Rev Dr Santé/T Gez 2004-2005, 389.

<sup>35</sup> SN 22 February 2006, III CZP 8/06, OSN 7-8/2006, item 123.

<sup>36</sup> See *Sentencia del Tribunal Supremo* (Supreme Court Decision, STS) 27 July 2006.

<sup>37</sup> Entscheidungen des Bundesgerichtshofes in Zivilsachen (BGHZ) 76, 249.



sterilisation, that a person undergoing sterilisation will want no more children, but the *BGH* had in mind a case where a sterilisation is performed primarily to prevent medical complications which might arise during a pregnancy, rather than out of a positive desire to have no more children. This, however, seems a somewhat artificial distinction to draw: a woman who wishes to be sterilised to avoid complications in pregnancy must surely also wish to avoid becoming pregnant as an inherent part of avoiding the resulting complications. Nonetheless, as a more general point, it does seem correct that claims for pecuniary losses following from the birth of an unintended but healthy child evidently presuppose that the birth of a child was in fact unintended: if that is not the case, then it seems correct that the claim should fail.

A second possible restriction on pecuniary claims is the idea that the benefits of a healthy birth should be balanced against the economic detriments, thereby reducing or possibly cancelling out (a 'deemed equilibrium') any amount to be awarded by way of pecuniary damages. In the English Court of Appeal decision *Parkinson v St James and Seacroft University Hospital NHS Trust*,<sup>38</sup> Hale LJ appeared to suggest that such an idea was operative in, and explained, the House of Lords' decision in *McFarlane*. However, to do justice to *McFarlane*, it must be appreciated that, while for instance Lord Millett had said that the 'balance' of having a healthy child lay in favour of its overall benefit to the parents, he was not suggesting a pecuniary exercise. On the contrary, he strongly rejected the idea of an exercise which might include giving a financial value to such a benefit of having a healthy child,<sup>39</sup> an idea similarly rejected by Lord McCluskey in the Court of Session below him.<sup>40</sup> Both judges viewed a child's life as of inestimable value and therefore not subject to any such financial balancing exercise. This seems correct: any value concocted for a healthy child would be both arbitrary and offensive to the dignity of human life. If pecuniary damages are to be awarded for unwanted births, it seems right that the figure awarded should not be discounted by any value attributed to the child itself, a view which it seems is gaining ground across Europe.<sup>41</sup>

### *B. Claims in respect of disabled children*

Claims in respect of healthy children have generated less jurisprudence than claims in respect of children who are born with a disability. In the latter type of case, the claimant is arguing that, in the absence of the defendant's faulty conduct, the disabled child would not have been born, either because it would not have been conceived or, having already been conceived, because its birth would have been aborted.

#### *1) Jurisdictional survey*

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<sup>38</sup> [2002] Queen's Bench (QB) 266 at 292.

<sup>39</sup> Per Lord Millett [2000] 2 AC at 111.

<sup>40</sup> 1998 SC at 404.

<sup>41</sup> See further the analysis of *Steininger* (fn 3) in this issue.

Jurisdictions permitting claims (at least to some extent) include Austria,<sup>42</sup> Belgium,<sup>43</sup> England and Wales,<sup>44</sup> Germany,<sup>45</sup> Greece,<sup>46</sup> Italy,<sup>47</sup> Latvia,<sup>48</sup> Netherlands,<sup>49</sup> Norway,<sup>50</sup> Poland,<sup>51</sup> Scotland,<sup>52</sup> and Spain.<sup>53</sup> In those in which only partial claims are allowed, the claim is usually restricted to the extra costs of childrearing imputable to the disability in question. Jurisdictions not permitting claims include France<sup>54</sup> and Denmark.<sup>55</sup>

## 2) *The type of harm claimed: problems of causal responsibility*

Because the claims relate in this category to disabled children, there is the inherent tricky moral question of whether, if an award is to be made, courts are running the risk of saying that a disabled child somehow represents ‘damage’ or ‘loss’ to parents, but a healthy child does not, thereby devaluing the life of the disabled child. Evidently, this can be avoided if the position is again taken that it is the costs (or extra costs) of childrearing that are conceived of as the relevant damage.<sup>56</sup> But does this raise potentially the same problem as discussed in relation to the birth of healthy children that such costs ought properly to be attributed to the parental duty of support and not the defendant’s fault? If that view were to be accepted, then it would logically follow that no childrearing costs would be claimable in such cases. As will be seen below, however, that is not the position that has been reached in nearly all jurisdictions, courts either ignoring or rejecting the argument that the

<sup>42</sup> Entire costs of upbringing of child with severe physical handicap claimable: OGH 11 December 2007, 5 Ob 148/07m; OGH 7 March 2006, 5 Ob 165/05h.

<sup>43</sup> *Tribunal de première instance*, Brussels, 21 April 2004, Rev Dr Santé/T Gez 2004-2005, 380; *Journal des Tribunaux (JT)* 2004, 716; *Revue générale de droit civil/Tijdschrift voor belgis ch burgerlijk recht (RGDC/TBBR)* 2006, 10817.

<sup>44</sup> Extra costs of raising a handicapped child recoverable, but not ordinary childrearing costs: *Parkinson* [2001] Court of Appeal (Civil Division) EWCA Civ 530, [2002] QB 266.

<sup>45</sup> BGH 18 June 2002 (the litigation was contractual, but the damages issues raised in tort are comparable). The permissive attitude of the BGH seems to be at odds with that of the Constitutional Court’s view that a living human being ought not to be classed as a source of harm (as to which, see BVerfGE 88, 203, 204, 296).

<sup>46</sup> Larisa Court of Appeal 544/2007, *Elliniki Dikaiosi* (EllDni) 2008, 289 (though damages were not awarded in this case, on the facts).

<sup>47</sup> Cass 10 May 2002, no 6735 (NGCC 2003, I, 619).

<sup>48</sup> Unpublished decision of the Senate of the Supreme Court, 26 September 2007, SKC-645 (though damages were not awarded in this case, on the facts).

<sup>49</sup> Entire costs of raising the child claimable: NJ 2006, 606.

<sup>50</sup> Entire costs of raising the child claimable: LF 1997-1005.

<sup>51</sup> Extra costs claimable: SN 13 October 2005, IV CK 161/05, OSP 6/2006, item 71.

<sup>52</sup> As in England, extra costs of care claimable: *McLelland v Greater Glasgow Health Board* 2001 SLT 446; *Anderson v Forth Valley Health Board* 1998 SLT 588.

<sup>53</sup> Extra costs claimable: STS 23 November 2007, RJ 2008\24.

<sup>54</sup> Art L 114-5 *Code de l’action sociale et des familles*, under which parents can claim for their non-pecuniary loss, but not for expenses relating to the disability of the child.

<sup>55</sup> Ruling of the Patient Insurance Board case 02.3296, 3 January 2003.

<sup>56</sup> Alternatively, one might argue that it is the loss of a reproductive right, such as the right to an abortion, which is, in appropriate cases, the nature of the damage suffered. This would clearly not apply in jurisdictions where no such right exists, and, in any event, given that most reported cases assess damages in relation to childrearing costs and/or loss of parental income, it is usual for courts to view the damage as the loss of the right to an abortion.

costs can be attributable to the parental duty of care rather than the fault of the defendant.

Even if that problem is overcome, however, a defendant might still try to argue in some cases that, in the absence of its fault, a healthy child is likely to have been born in any event. That might be so in cases where, for instance, an hereditary disease affects only children of one sex, and the fault lies in not selecting a foetus of the unaffected sex for implantation into the mother's womb as part of fertility treatment. In such a case, the defendant ought, in principle, to be able to argue that, absent the fault, the ordinary costs of childcare would have been incurred in any event, though not the extra costs associated with a disabled child, thus restricting any claimable damages to the extra costs attributable to the disability. The logic of such an argument seems impeccable, and there seems no good reason why such a causal objection should not be maintainable by the defendant.

### *3) Damages claimable*

Typically damages claims, where permitted, will be for either the full costs of childcare or, if a more restrictive approach is taken by the system in question, the extra costs of childcare attributable to the child's disability. Additionally, loss of parental income during the period for which the child requires extra care on account of its disability should be claimable, but not loss of income during pregnancy nor the medical expenses of pregnancy and childbirth, given that these latter costs would have been incurred in the event of the birth of a healthy child in any event.

As an example of practice, the Austrian Supreme Court has taken the view that it is the obligations of childcare which constitute the alleged damage, and that this is a type of damage encompassed by the wide definition of damage in § 1293 Austrian Civil Code (*Allgemeines bürgerliches Gesetzbuch*, ABGB). Therefore, it has held that, in a case where, had the disability been discovered, an abortion would have been performed, the comparison is between the economic position the parents would have been in had no child been born and their actual economic position, holding therefore that all the costs of childcare are claimable.<sup>57</sup> This approach of the Austrian Supreme Court to claims in respect of disabled children is quite different from that which it has taken in the case of the birth of a healthy child, where no economic losses are claimable, and indeed from the approach taken in earlier cases of disabled children, where child maintenance costs were said to be claimable only where these caused an extraordinary burden.<sup>58</sup> It has in consequence been said that the Austrian jurisprudence on this subject is confused and in need of legislative clarification.<sup>59</sup>

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<sup>57</sup> OGH 11 December 2007, 5 Ob 148/07m.

<sup>58</sup> OGH 7 March 2006, 5 Ob 165/05h.

<sup>59</sup> See *BC Steininger*, Austria, in: *H Koziol/BC Steininger* (eds), *European Tort Law* 2008 (2009) 114-117.

The English courts, by contrast with the Austrian courts, have chosen not to award full costs in cases of a disabled child born in circumstances where, in the absence of the fault, no child would have been born; instead, merely extra costs due to the disability may be claimed.<sup>60</sup> This restriction has been justified for the policy reason advanced in *McFarlane* of seeing the birth of a child as a blessing.<sup>61</sup> Even more restrictedly, in one English decision, *Salih v Enfield Area Health Authority*,<sup>62</sup> the Court of Appeal held that, because the facts indicated that, had the disabled child not been born, the plaintiffs would have gone on to have several more children, thereby incurring in any event costs at least equal to the increased costs of childrearing of the disabled child in question, this meant that the entire head of claim relating to the costs of maintaining the child was extinguished. This reasoning was criticised in a later Scottish judgment, on the basis that costs incurred in respect of a specific child cannot be seen as costs which would have been incurred for an identical purpose, every child being a unique individual, and therefore such costs ought not to be discounted.<sup>63</sup> The Scottish court's criticism is not entirely convincing given that, while children are doubtless unique, the costs of their upbringing are not, but the reasoning in *Salih* itself is rather suspect as to assume that planned further children *would* have been born and *would* have led to childrearing costs being incurred by the parents seems too speculative to merit inclusion in a posited counterfactual scenario.

Staying with Scotland, the Scottish courts have somewhat struggled to describe the nature of the consequences for which they are compensating when awarding pecuniary damages in disabled child actions. In one case, the court seemed to view the economic consequences flowing from the birth of a disabled child as simply one component aspect of a totality of harm which is a mixture of both economic and physical loss,<sup>64</sup> a quite different approach to the pure economic loss analysis of the majority of the judges in *McFarlane*. However, in a later case, it was said by one judge that childrearing costs were pure economic losses, a separating out of the economic costs as a freestanding type of harm view which was criticised earlier, though one doubtless done to justify the exclusion of such ordinary childrearing costs. There have also been suggestions in one Scottish case that it is the birth of the unwanted, disabled child itself which is the harm, a suggestion which is ethically questionable and undesirable.<sup>65</sup>

It is suggested that the preferable approach to the question of what costs should be recoverable is that, if the facts show that a healthy child would have been born absent the fault, then it is only the *extra* costs of childrearing, together with loss of income deriving from *extra* assistance provided by parental carers on account of the

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<sup>60</sup> *Parkinson* [2001] EWCA Civ 530, [2002] QB 266.

<sup>61</sup> See Lord Millett in *McFarlane v Tayside Health Board*, 2000 Session Cases, at 44.

<sup>62</sup> [1991] 3 All England Law Reports (All ER) 400.

<sup>63</sup> See comments of Lord Morison in *McLelland* 2001 SLT 446.

<sup>64</sup> *Anderson* 1988 SLT 588.

<sup>65</sup> The judge in *Anderson* commented that '[w]hile the [Abortion] Act does not expressly say so, it may, I think, be taken from its provisions that the birth of a child so handicapped may be regarded as a harmful event for those most immediately affected by his existence, who would in the ordinary course be his parents.' A similar approach has been taken in one unorthodox Spanish decision: TS 6 June 1997, RJ 1997/4610.

disability, which constitute the relevant harm. If, on the other hand, the fault is such that, in its absence, it is likely that no child would have been born (for instance, because the defendant negligently failed to warn that any children born would likely be disabled, and that had such warning been given any birth would have been avoided), then all costs should be recoverable. What the counterfactual outcome would have been should be determined according to the usual rules of evidence, though admittedly it may not always be easy to determine what parents would have done in the absence of the defendant's fault.<sup>66</sup> This distinction in suggested approach can be justified on causal grounds: the law of tort is trying to put the claimant in the counterfactual position in which he would have been had the fault not occurred. In the case of either outcome, for the policy reason of discouraging medical negligence, the relevant costs should be attributable to the negligent defendant even if it is alternatively arguable that the costs arose primarily because of the parental duty to support the child: the policy of discouraging medical negligence justifies holding the defendant responsible for the relevant losses. The economic harm caused should be seen as a component element of an overall harm including also the mental anguish and distress caused by the fault of the defendant, so that any economic consequences should not be considered pure economic loss.

### **III. Future development of the law**

Harmonisation at a European level of the approach adopted to pecuniary damages in wrongful life claims may be somewhat problematic given the different approaches of national systems discussed earlier to questions of damage and the attribution of responsibility to causes. In particular, in cases where healthy children are born there is quite a degree of divergence in the question of whether costs relating to such a healthy child should ever be claimable. If there were to be harmonisation in this type of case, it would inevitably have to proceed from a clear understanding that the relevant damage is not the existence or birth of the child itself, but rather the economic costs associated with birth and childrearing. Such an understanding would be required to counter arguments that pecuniary claims are offensive to the dignity of human life. Even if it were the 'economic consequences' of the birth which were recoverable, a clear view would then be needed as to which of such pecuniary consequences could be claimable, given that some such consequences can conceivably be argued to be attributable most naturally to the parental duty of support rather than any blameworthy conduct of potential defendants. That problem can probably be overcome, as it has been in a number of jurisdictions, but there would remain the objections of some Common law and Scots law judges that such economic costs are properly viewed as pure economic loss and thus not claimable. It has been argued above that, viewing the couple as an economic unit, such costs are better seen as derivative or consequential economic loss flowing from the initial harm, whether that initial harm is best viewed in personal injury terms, or personality or family right terms.<sup>67</sup> Agreement on this

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<sup>66</sup> In a case where the parents' counterfactual behaviour cannot be determined, a default minimum of at least the extra costs attributable to the disability could be awarded.

<sup>67</sup> For a discussion of such alternative characterisations of the primary harm, see further this issue, *E Bagińska*, Wrongful Birth and Non-Pecuniary Loss: Theories of Compensation.

point remains some way off, however, and forms part of an ongoing debate about the nature of damage in European private law.<sup>68</sup>

In the case of disabled children, however, there does already seem to be an emerging consensus that at least the extra costs of care attributable to the disability should be claimable as pecuniary damages. What requires to be settled is whether the full costs of childcare should ever be claimable. It has been argued that that should be the case only where the facts indicate that, in the absence of the relevant fault, no child would have been born.<sup>69</sup> What is thus crucial is a consideration of the counterfactual outcome of the given case in the light of the appropriate rules of causation. If those counterfactual facts indicate that all the economic costs associated with the child's upbringing would have been avoided, then it seems appropriate that all those costs should be claimable as the relevant damage.

For the present, harmonisation of this field is likely not to be achievable in the short to medium term. The biggest problem remains divergent jurisdictional attitudes to the nature, categorisation, and treatment of damage. Without convergence in that fundamental component of tortious claims, pecuniary damages for wrongful birth will continue to demonstrate a high degree of jurisdictional difference.

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<sup>68</sup> The subject of the nature of damage forms the topic of *B Winiger/H Koziol/BA Koch/R Zimmermann*, Digest of European Tort Law, Volume 2: Essential Cases on Damage (publication of which is expected in 2011).

<sup>69</sup> More subjective tests like whether the child is or is not valued by the parents seem uncertain in their application and lack practicability.